Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MARK WIENER,

Petitioner,

v.

LAWRENCE-PICASO, INC.,
LAWRENCE PICASO, INC. d/b/a
LAWRENCE PROPERTIES and
LAWRENCE PROPERTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT, STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

MELVIN S. HIRSHOWITZ
Counsel of Record
SUSAN ADLER
Attorneys for Petitioner
630 Third Avenue
New York, NY 10017-6705
(212) 867-9595

179563

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

57pp

QUESTIONS PRESENTED

1. Is the due process guaranteed by the Fourteenth Amendment violated where a state court grants a right to jury trial but then overturns the verdict in gross violation of the state's standards for review of a jury verdict, thereby depriving the party in whose favor the verdict was rendered of a valuable property interest, without due process of law?

2. Is the last clause of the Seventh Amendment, which prohibits reexamination of jury verdicts except as permitted under the rules of the common law, applicable to cases tried in the state courts, as held by this Court in *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897)?

3. Is the due process and equal protection of the laws guaranteed by the Fourteenth Amendment violated when a state in a case where only damages have been appealed, with no cross appeal filed by the defendant, without any notice, and in severe violation of the state's procedural requirements, overturns the jury's verdict on liability?

4. Is the due process and equal protection of the laws guaranteed by the Fourteenth Amendment violated where a contract requires automatic renewal and the state courts chose to ignore and violate that provision of the contract?

5. Is the due process and equal protection of the laws guaranteed by the Fourteenth Amendment violated when a state court in a civil case falsely accuses the plaintiff of forgery of which he is totally innocent by legal definition?

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Petitioner respectfully petitions for a writ of certiorari to review the final judgment of the Supreme Court of the State of New York, affirmed by the Appellate Division of the Supreme Court of the State of New York, as to which the New York Court of Appeals, the highest court of New York State, denied leave to appeal.

OPINIONS BELOW

The opinion of the Appellate Division of the New York State Supreme Court affirming the final judgment is published at 295 A.D.2d 273, 744 N.Y.S.2d 392 and is attached as Appendix A.

The opinions and orders of the trial judge setting aside a portion of the jury verdict are unpublished and are attached as Appendices D and E.

The order of the New York State Appellate Division denying reargument and leave to appeal is unpublished and is attached as Appendix F.

The order of the New York State Court of Appeals denying leave to appeal is published at 99 N.Y.2d 504, __ N.Y.S.2d __, __ N.E.2d __, and is attached as Exhibit G.

The final judgment of the Supreme Court of the State of New York, County of New York, is unpublished and is attached as Appendix B.

STATEMENT OF JURISDICTION

The opinion of the Appellate Division of the New York State Supreme Court denying petitioner's appeal was entered on June 27, 2002. The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal was entered on December 17, 2002 and is set forth in Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

A. ***United States Constitution, Seventh Amendment***

Trial by jury in civil cases.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

B. ***United States Constitution, Fourteenth Amendment, Section 1***

> [N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Mark Wiener ("Employee") was hired by respondents pursuant to a written employment agreement ("the Agreement") of August 1997 as a property manager. Respondents ("Employer") are in the business of managing real estate. Simultaneously with his employment, Employee caused owners of certain valuable properties ("the Ackerman Properties") to transfer management and leasing of those properties to Employer (PA89-90, PA100-101, PA108-111, PA116-117, and PA427-429).[1] Thus, this was not simply an Employer-Employee arrangement; it involved from inception the transfer of assets to Employer (the Ackerman Properties) as an inherent part of the transaction.

The Agreement provided that Employee's employment would continue for a "minimum of three years . . . and thereafter shall automatically renew on a year to year basis". It was further agreed that Employer could terminate the agreement at any time on 14 days prior written notice in the event of Employee's "willful non-performance or malfeasance" or if the Ackerman Properties were no longer managed by Employer (PA428 and Appendix H, p. 25a).

Employee sued for breach of contract and produced at trial expert testimony that in all likelihood the Ackerman Properties would remain with Employer for about ten to twenty years. Employer did not produce at trial any expert testimony of its own to refute this. Employer alleged that its

---

1. "PA" refers to Employee's (Petitioner's) Appendix filed with the Appellate Division of the New York State Supreme Court, First Department. "RA" refers to Employer's (Respondents') Appendix filed with such court.

firing was justified and that it owed nothing, claiming that Employee was guilty of willful non-performance and malfeasance (PA220 and PA359-362).

A. There Was Sharply Conflicting Trial Testimony on Employer's Defenses. The Jury Resolved The Critical Issue of Credibility, Believing Employee and Not Employer's Witnesses

The case was tried before a jury in the state courts of New York (Supreme Court of the State of New York, County of New York) over eight days during December 2000. Most of the trial was consumed by Employer's attempt to show Employee malfeasance or willful non-performance and by detailed Employee evidence and testimony contradicting each and every particular of Employer's alleged evidence (PA14, PA20, and PA361).

The case was submitted to the jury under instructions that it was to award nothing to Employee if it found him guilty of malfeasance or willful non-performance but that if it did not, that Employer would have breached the contract and the jury was to award damages to compensate for the breach (PA361-362).

The jury totally rejected Employer's claims of malfeasance and willful non-performance, finding that Employee was "ready, willing and able" to do his job and found Employer had breached the Agreement when it fired Employee (PA16-17). The jury awarded Employee $205,000 in damages which it explained in a note was 4.5 years at $50,000 per year ($225,000) (Employee's salary including benefits), less unemployment benefits of $20,000 (Appendix D and PA16-19).

In his September 10, 2001 decision on Employer's post-trial motion the trial judge held:

> At Trial, conflicting evidence was presented regarding the acts of the plaintiff, with the issue being the credibility of each side's witnesses.
>
> * * *
>
> In this case, the jury verdict finding a breach of the employment contract is amply supported by the credible evidence.

Appendix E, pp. 17a-18a and PA14.

The trial judge thus held that there was "conflicting evidence . . . regarding" Employer's claims of malfeasance and willful non-performance and that the decisive issue was the "credibility of each side's witnesses". Correctly, in this part of his opinion, the trial judge sustained the jury verdict which totally rejected Employer's claims of malfeasance and willful non-performance.

B. The Trial Judge Unlawfully and Flagrantly Disregarded The Automatic Renewal Provisions of the Written Contract

The trial judge, however, refused to permit an award of damages beyond the end of the minimum three year period. Thus, he set aside the jury's verdict to the extent it awarded damages during the period of automatic renewal, holding:

> While there was ample credible evidence of a breach, there was a lack of credible evidence

> regarding the probability of renewal of the subject employment contract.

Appendix E, p. 18a and PA14.

Since the renewal was automatic (PA428), no evidence could possibly be needed to show "the probability of renewal". Without justification of any kind and giving no reason, the trial judge read the automatic renewal clause out of the contract and unlawfully reduced the damages from $205,000 to $34,266.67, plus interest (Appendices D and E and PA11-15).

C. The Appellate Division Violated New York Law and Employee's Rights to Due Process and Equal Protection When It Considered Liability Issues Which Had Not Been Appealed

An appeal was taken by Employee to the Appellate Division of the New York State Supreme Court appealing only from the reduction of the damages awarded by the jury from $205,000 to $34,266.67. There was no cross-appeal by the Employer (PA3-5).

Under New York law in such a situation the appellate court's jurisdiction is limited to the damages issue appealed and it may not consider liability issues, since only the reduction in damages was appealed [e.g., *Vias v. Rohan*, 119 A.D.2d 672, 501 N.Y.S.2d 109 (2d Dep't 1986); ***4 New York Jurisprudence 2d, Appellate Review § 149***, p. 195; *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dep't 1986) and *City of Mount Vernon v. Mount Vernon Housing Authority*, 235 A.D.2d 516, 652 N.Y.S.2d 771, 772 (2d Dep't 1997)]. Employee did not receive equal protection

of the laws since this binding principle of New York law was not applied in his case.

In violation of this principle, and without any notice to Employee, the New York State Appellate Division overturned the jury's verdict on liability, finding against the Employee on both malfeasance and willful non-performance, neither of which was before it (Appendix A).

The New York State Appellate Division violated Employee's right to due process when it overturned the jury's verdict on these issues in blatant violation of hallowed common law principles that a jury's verdict cannot be overturned where the matter depends on resolution of disputed issues of credibility.

The crucial holding of the New York State Appellate Division was an outrageous, unlawful directed verdict that Employee had committed forgery and had totally failed to visit the buildings he was managing which, in egregious error the New York State Appellate Division held "constituted wilful non-performance and malfeasance" as a matter of law (Appendix A, p. 3a).

D. The Appellate Division In Severe Error, Unlawfully and Falsely Directed A Verdict On Alleged "Forgery" Where The Evidence Was Clear There Was No Forgery Committed. Thereby It Nullified Employee's Constitutional Right to The Rendered Jury Verdict

The New York State Appellate Division's taking of the issue of supposed forgery from the jury sets an extremely dangerous precedent severely abridging the constitutional right that a jury verdict may be reviewed only as permitted

under the rules of the common law. The New York court unlawfully imposed its own personal and biased view rather than permitting the jury verdict to stand as is constitutionally required. The New York State Appellate Division falsely and in flagrant error accused Wiener of committing forgery, which Wiener never did.

The New York State Appellate Division's direction of a verdict on forgery is necessarily a direction of a verdict on the crucial element of intention to defraud [e.g. ***New York Penal Law, § 170.05***]. That holding of the New York State Appellate Division totally violates Employee's right to the jury verdict on that issue which found him totally innocent of all charges.

The evidence on the "forgery" question in the Record was the following:

A. Employee as managing agent filed two (2) New York City required multiple dwelling registration forms on behalf of persons who were in fact the owners. The owners were not available at the time and these required forms needed to be promptly filed. There was no cheating or defrauding of the owners since Employee did exactly what they wanted, registering their buildings in an accurate and timely manner (RA28-RA30, RA165, and RA281).

B. Employee signed without simulating the owner's signature in any manner or form (RA31-RA32 and RA280). He signed in his own handwriting since he was the owner's agent (*ibid.*). In light of this undisputed evidence, the trial judge would not "allow the use of the term forgery in this case" (RA171). He held that Employer had "not even come close to proving forgery" (RA173).

C. Employee received no profit or benefit of any kind. There was no money or any other economic benefit of any kind which he received (RA33 and RA281). This key and critical element of forgery was totally absent here.

D. Employee testified that he would have asked the owners to sign if they were available, but they were not, and on behalf of the owners, he wanted to get these required forms promptly filed (RA29-RA30 and RA249).

Employee's testimony totally contradicted any fraudulent or deceitful intent. Since it was established that no gain could have been obtained by Employee as a result of the signing of these documents, and that the owners had no choice but to sign these forms as a required formality, forgery was not a credible issue; therefore, the jury ruled there was no forgery committed and it considered Employee to be a credible witness. In violation of the Constitution, the New York State Appellate Division held that it would decide on credibility, not the jury, and it thereby jeopardizes every U.S. citizen's right to trial by jury.

During Employee's period of employment Employer was fully aware of the signing of these forms which it then regarded as totally innocuous, giving no notification of any kind to Employee (RA637). Therefore, for the New York State Appellate Division to direct a verdict on this was ludicrous and unconstitutional.

E. The New York Appellate Division Unconstitutionally Disregarded The Buildings Visitation Evidence Supplied By The Employee and Acknowledged By The Employer and Resolved Issues of Credibility Which Were The Sole Province of the Jury

Employee repeatedly testified at trial that he complied with his responsibilities and visited all buildings he was managing whenever it was necessary (RA174, RA178 and RA180, emphasis added). Some buildings he had to visit "more than once a week", others less "depending upon the necessity" (RA175). He testified he stayed at a building when he visited it "about an hour" (*ibid.*). As shown by defendants' attorney's concession, Employee made a minimum of 120 visits to his buildings during his term of employment (PA303 and RA805-RA816).

Employee's testimony was that his superiors never set a "minimum standard", the number of minimum required visits (RA81 and RA176-RA177). Employee's officers testified to the contrary, creating an issue of who was lying (RA313 and RA521-RA522). The jury was very concerned with this conflict and who was lying. During its deliberations the jury gave the trial judge a note stating insofar as relevant:

> Was Mark [Employee] told in writing of job responsibilities to visit weekly?

PA402. The answer given by the lower court was "No" (PA402). There was no exception.

Employee never was told his visits to the buildings were not sufficient (RA190).

The jury which carefully reviewed the evidence had its verdict overturned by the New York State Appellate Division which was imposing its own distorted and unconstitutional views of who to believe. The trial judge correctly ruled the issue "was the credibility of each side's witnesses" (Appendix E, p. 17a).

F. It Was For The Jury To Determine Whether There Was Wilful Non-Performance And Malfeasance By Employee Especially In Light of Employer's Admitted Failure To Give Any Written Notice As Mandated By Paragraph 6 of The Contract

The Agreement provided in paragraph 6 that if Employee's performance "fails to satisfy reasonable standards" he was to be given:

> . . . written notice setting forth the areas where Employee has failed to perform adequately and shall provide Employee with a three month period to correct such deficiencies.

PA428 and Exhibit H.

Employer admitted no written notice was given here (RA688-RA689), which was confirmed by Employee (PA153). Since there was no written notice, there was no wilful nonperformance.

The clear purpose of this contract provision was to require that alleged defects be set forth in writing during the term of employment, with an opportunity to cure, rather than to have *ex post facto* creation of never previously mentioned

complaints, after the employee was fired. As Employee's attorney argued in summation:

> [H]e was supposed to get notice if he wasn't performing. No one can read paragraph 6 and say Mark Wiener wasn't supposed to get written notice that he wasn't performing.

PA333.

G. Employee Duly Raised In The State Courts His Constitutional Claims

Given the absence of notice to Employee before the New York State Appellate Division rendered its opinion that it was going to violate his constitutional rights in its opinion, the first opportunity Employee had to assert these outrageous due process, equal protection and Seventh Amendment violations was in his motion to the New York State Appellate Division for reargument or, in the alternative, leave to appeal to the New York State Court of Appeals. In that Notice of Motion dated July 22, 2002, Employee stated that the New York State Appellate Division Opinion of June 27, 2002:

> severely denies and abridges the constitutional right to jury trial.

Notice of Motion, p. 2.

It was further stated in that Notice of Motion that such Opinion:

> permits, in flagrant violation of . . . constitutional due process, an appeal of liability issues where

> the only issues appealed were damages, with no notice being given to plaintiff that liability issues were to be considered.

Notice of Motion, p. 2.

In the affirmation in support of such motion it was stated:

> This Court's [the Appellate Division's] Opinion and Order of June 27, 2002 severely infringes the right to jury trial expounded by the Court of Appeals [of New York State].

Affirmation, p. 12.

> This Court [the Appellate Division] violated the law of this State when it denied the plaintiff [Employee] his constitutional right to trial by jury by nullifying the jury verdict which found in favor of the plaintiff.

Affirmation, p. 1.

Such affirmation further stated that the New York State Appellate Division's "consideration of . . . liability issues without notice to [Employee] was a violation of procedural due process" (Affirmation, p. 10).

Such affirmation further stated:

> Defendant withdrew its cross appeal [PA5]. Thus, none of the issues of liability were properly before this Court [the Appellate Division]. . . .

> There was a patent violation of procedural due process. . . .
>
> [W]ithout any notice to [Employee] or his counsel, this Court [the Appellate Division] chose to bottom its Opinion on liability issues. . . .
>
> This was a patent violation of procedural due process.

Affirmation, p. 11.

In his motion for leave to appeal to the New York Court of Appeals Employee stated:

> The constitutional right to jury trial has been unlawfully eviscerated.

Notice of Motion to Court of Appeals, dated 11/1/02, p. 2.

> The Appellate Division in its Opinion of June 27, 2002 . . . violated . . . the constitutional right to jury trial when it chose to take these issues of credibility from the jury and decide them itself by directing a verdict against plaintiff on the critical factual issues.

Motion to Court of Appeals for leave to appeal, p. 4.

> [The Appellate Division] . . . took away from [Employee] his constitutionally granted right to a rendered jury verdict.

Id., p. 14.

> There was no cross appeal by [Employer]. Thus, none of the issues of liability were properly before the Appellate Division. . . .
>
> There was a patent violation of procedural due process. [Employee's] Notice of Appeal was limited to the reduction in damages from $205,000 to $34,266.67. . . .
>
> Nonetheless, without any notice to [Employee] or his counsel, the Appellate Division chose to bottom its Opinion on liability issues. . . .
>
> This was a patent violation of procedural due process.

Id., pp. 17-18.

REASONS FOR GRANTING THE WRIT

A. The New York State Appellate Division Violated Employee's Constitutional Rights to Due Process, Equal Protection of the Laws, and Under the Seventh Amendment, Last Clause

The New York State Appellate Division took from Employee his proprietary right to the rendered jury verdict of $205,000, without due process of law.

It equally violated the rules of the common law incorporated in the Seventh Amendment, second clause when it overturned the jury's verdict that there was no malfeasance or willful non-performance.

In *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), this Court held:

> It is clear that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state.

166 U.S. at 242-243.

The last clause of the Seventh Amendment provides:

> [N]o fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

In the case at bar, the New York State Appellate Division devastated "the rules of the common law" when it reversed the jury verdict on the issue of credibility, as to witnesses only the jury had seen and heard.

New York State deprived Employee of his constitutional rights when it took from him by illegal violations of its own procedures the benefit of a $205,000 jury verdict.

B. Employee Had A Property Interest In The Rendered Jury Verdict Which Was Taken From Him Without Notice and Illegally in Violation of Due Process and Equal Protection

It has been recognized by this Court that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause". *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 428 (1982) citing *Mullane* v, *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). It is likewise well-established that "[w]herever one is assailed in his person or his property, there he may defend [citations omitted]." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).

Indeed, in *Logan*, this Court recognized that it has "traditionally held that the Due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or plaintiffs attempting to redress grievances." 455 U.S. at 459. Thus, "[s]imilarly, the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures when such an action would be the 'equivalent of denying them an opportunity to be heard upon their claimed right(s).' " *Id.* at 429-430, quoting, *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

Thus, in *Logan*, this Court held that an employee's right to use the Illinois Fair Employment Practices Act's adjudicatory procedures was a species of property protected by the due process clause and that the employee was entitled to have the Commission consider the merits of his charge.

See also New York State National Organization for Women v. Pataki, 261 F.3d 156 (2d Cir. 2001), which held that "the Fourteenth Amendment guarantee of due process is fully applicable to adjudicative proceedings conducted by state and local government administrative agencies", 261 F.2d at 163 and that "[t]here is no dispute that a legal cause of action constitutes a 'species of property protected by the Fourteenth Amendment's Due Process Clause.' [Citations omitted.]" 261 F.3d at 163. The New York State Appellate Division, First Department, itself has found that the "right to utilize adjudicatory procedures established by state law constitutes a property interest", *In the Matter of the Application of Deas v. Levitt*, 139 A.D.2d 1, 6, 530 N.Y.S.2d 807, 810 (1st Dep't 1988) relying on *Logan*, 455, U.S. 422.

This Court has expressed concern for whether a

> plaintiff has been accorded due process in the primary sense, . . . whether it has had an opportunity to present its case and be heard in support . . .[W]hile it is for the state courts to determine the adjective as well as substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Richards v. Jefferson County, Alabama, 517 U.S. 793, 804 (1996), quoting *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-682 (1930).

As has been recognized, "[a] fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Here, where Employee was not heard before the New York State Appellate Division on the liability issues, including the alleged forgeries, this effectively deprived Employee of his opportunity to be heard.

In the instant case, the jury found, after seeing and hearing the witnesses and deciding who was telling the truth and who was lying, that the Employee was entitled to recover from the Employer the sum of $205,000. Without hearing any evidence (and thus, preventing any adjudicatory procedure), the New York State Appellate Division held that the Employee had committed forgery and had not visited the properties he was managing, despite the fact that these issues were not even before the Court and could be decided only based on credibility of witnesses. Having received no notice from the New York State Appellate Division, this Employee had no opportunity to defend against these charges at the Appellate Court level. Thus, the New York State Appellate Division deprived Employee of due process and equal protection of the laws by depriving him of any adjudicatory procedure on the liability issues, including the serious matter of alleged forgery.

Like a cause of action, a jury verdict in its favor should be viewed as a property right of the litigant, of which it should not be deprived without due process of law.

C. The Petition Should Be Granted

To take from Employee a $205,000 jury verdict, where the only issues were jury issues of credibility, is to deny Employee due process of law as well as to violate the last clause of the Seventh Amendment since this jury verdict was overturned without notice totally in violation of the "rules of the common law".

To permit the New York State Appellate Division to find the Employee guilty of forgery when this issue was not before it and to further allow it to do so without offering Employee any opportunity to adjudicate this issue violates due process.

Due process requires that a state adhere to its own basic procedural rules in reviewing and revising jury verdicts. This case presents an excellent opportunity for this Court to review and vindicate that principle.

Granting certiorari in this case will benefit American jurisprudence so that the due process clause becomes an effective limit on abusive power of state appellate courts in civil cases.

Moreover, the second clause of the Seventh Amendment should be given the role envisioned by this Court in *Chicago, B. & Q. Co. v. Chicago*, *supra*, so there is a constitutional remedy for the unlawful and outrageous revision of jury verdicts in violation of the rules of the common law.

CONCLUSION

The Supreme Court must grant certiorari. This case presents an extremely important opportunity for this Court to vindicate the right to jury trial in this country so that rendered jury verdicts are not abusively and unlawfully set aside by state appellate courts, in violation of due process, equal protection of the laws and the last clause of the Seventh Amendment.

Every United States citizen's right to trial by jury is in severe jeopardy if the travesty of justice exhibited in this case is not remedied by the United States Supreme Court.

Respectfully submitted,

MELVIN S. HIRSHOWITZ
Counsel of Record
SUSAN ADLER
Attorneys for Petitioner
630 Third Avenue
New York, NY 10017-6705
(212) 867-9595